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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

No. 78-521

DR. JOHN YIAMOUYIANNIS,
Petitioner,

vs.

CHEMICAL ABSTRACTS SERVICE, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

This petition seeks review of *Yiamouyiannis* v. *Chemical Abstracts Service,* U.S. Ct. of Appeals for the Sixth Circuit, Case No. 77-3148, June 29, 1978, appended hereto. There were no other opinions rendered below.

JURISDICTION

The order sought to be reviewed is dated June 29, 1978, and is a judgment of the United States Court of Appeals for the Sixth Circuit.

No rehearing or extension of time within which to petition for certiorari was sought or granted.

Jurisdiction is conferred on this Court to review the judgment below by 28 USC § 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

I.

The American Chemical Society is an instrumentality of the federal government, and is a public corporation.

II.

Under the circumstances of this case, conduct unduly restrictive of freedom of speech which is attributable to the American Chemical Society constitutes government action sufficient to render the American Chemical Society liable for damages under the general doctrine of *Bivens* v. *Six Unknown Agents,* 403 U.S. 388 (1971), in a suit brought directly under the First Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES RELIED UPON

CONSTITUTION OF THE UNITED STATES

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibit the free exercise thereof; or abridging the freedom of speech; or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

UNITED STATES STATUTES: AN ACT TO INCORPORATE THE AMERICAN CHEMICAL SOCIETY; 50 Statutes at Large, Ch 762, Aug. 25, 1937.

[CHAPTER 762]

AN ACT

To incorporate the American Chemical Society.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the persons following: Robert T. Baldwin, Edward Bartow, Erle M. Billings, E. K. Bolton, Willard H. Dow, Gustavus J. Esselen, Arthur J. Hill, Townes R. Leigh, Thomas Midgely, Junior, Charles L. Parsons, R. E. Swain, E. R. Weidlein, Frank C. Whitmore, H. H. Willard, and R. E. Wilson, being persons who are now directors of the American Chemical Society, a corporation existing under the laws of the State of New York, their associates and successors duly chosen, and such other persons as now are or may hereafter be associated with them as officers or members of said American Chemical Society, are hereby incorporated and constituted and declared to

be a body corporate by the name of American Chemical Society.

SEC. 2. That the objects of the incorporation shall be to encourage in the broadest and most liberal manner the advancement of chemistry in all its branches; the promotion of research in chemical science and industry; the improvement of the qualifications and usefulness of chemists through high standards of professional ethics, education, and attainments; the increase and diffusion of chemical knowledge; and by its meetings, professional contacts, reports, papers, discussions, and publications, to promote scientific interests and inquiry, thereby fostering public welfare and education, aiding the development of our country's industries, and adding to the material prosperity and happiness of our people.

SEC. 3. That the American Chemical Society shall have power to make its own organization, including its constitution, bylaws, rules, and regulations; to fill all vacancies created by death, resignation, or otherwise; to provide for the election of members, their division into classes, and all other matters needful and useful to promote the objects of the society. It shall hold an annual meeting at such place in the United States as may from time to time be designated.

SEC. 4. That the American Chemical Society shall, whenever called upon by the War or Navy Department, investigate, examine, experiment, and report upon any subject in pure or applied chemistry connected with the national defense, the actual expense of such investigations, examinations, experiments, and reports to be paid from appropriations which may have been made for that purpose by Congress, but the society shall receive no compensation whatever for any services to the Government of the United States: *Provided,* That the title to any and all

inventions and discoveries made in the course of such investigations, examinations, and experiments that, in the opinion of the Secretary of the Navy or the Secretary of War, involve the national defense, shall vest in the Government of the Uinted States, and the Government of the United States shall have unlimited license under all other inventions and discoveries.

SEC. 5. That the American Chemical Society be, and the same is hereby, authorized and empowered to receive, by devise, bequest, donation, or otherwise, either real or personal property and to hold the same absolutely or in trust, and to invest, reinvest, and manage the same and to apply said property and the income arising therefrom to the objects of its creation.

SEC. 6. That as soon as may be possible after the passage of this Act a meeting of the directors hereinbefore named shall be held at the city of Washington in the District of Columbia by notice served in person or by mail addressed to each director at his place of residence by the Secretary of the American Chemical Society, a New York corporation, and the said directors, or a majority thereof, being assembled, shall organize and proceed to adopt bylaws, to elect officers and appoint committees, and generally to organize the said corporation; and said directors herein named, on behalf of the corporation hereby incorporated, shall thereupon receive, take over, and enter into possession, custody, and management of all property, real or personal, of the corporation heretofore known as the American Chemical Society, incorporated as hereinbefore set out under the laws of the State of New York on November 9, 1877, and to all its rights, contracts, claims, and property of any kind or nature; and the several officers of such corporation, or any other person having charge of any of the securities, funds, real or personal, books or property thereof, shall,

on demand, deliver the same to the said directors appointed by this Act or to the persons appointed by them to receive the same; and the directors of the existing corporation and the directors herein named shall and may take such other steps as shall be necessary to carry out the purposes of this Act.

SEC. 7. That the rights of the creditors of the said existing New York corporation known as the American Chemical Society shall not in any manner be impaired by the passage of this Act, or the transfer of the property hereinbefore mentioned, nor shall any liability or obligation for the payment of any sums due or to become due, or any claim or demand, in any manner or for any cause existing against the said New York corporation, be released or impaired; but such corporation hereby incorporated is declared to succeed to the obligations and liabilities and to be held liable to pay and discharge all of the debts, liabilities, and contracts of the said New York corporation so existing to the same effect as if such new corporation had itself incurred the obligation or liability to pay such debt or damages, and no such action or proceeding before any court or tribunal shall be deemed to have abated or been discontinued by reason of the passage of this Act.

SEC. 8. That the corporation shall, on or before the 1st day of December in each year, transmit to Congress a report of its proceedings and activities for the preceding calendar year, including the full and complete statement of its receipts and expenditures. Such reports shall not be printed as public documents.

SEC. 9. That the right to alter, amend, or repeal this Act is hereby expressly reserved.

SEC. 10. That this Act shall date from the 1st day of January 1938.

Approved, August 25, 1937.

STATEMENT OF THE CASE

On November 6, 1972, Dr. John Yiamouyiannis brought suit in the United States District Court for the Southern District of Ohio, Western Division, against Chemical Abstracts Service, a division of the American Chemical Society, and others, claiming federal jurisdiction under the First Amendment to the United States Constitution, and 28 U.S.C. § 1331. The complaint alleged that the Plaintiff had been employed as an Associate Editor with Chemical Abstracts Service, and in such capacity did competent work; that his employment was terminated solely because he spoke in public against fluoridation of water supplies used for human consumption, and without other justification; and that, under the circumstances, such termination was effective action of the federal government, in deprivation of his constitutional right of free speech, all to his damage in the amount of $3,885,900.00. The answer was, in effect a general denial of the allegations in the complaint, and set up further that no cause of action or basis of federal jurisdiction had been pleaded. Following appropriate motions and hearings, the suit was dismissed by Hon. Joseph Kinneary, District Judge, for want of a cause of action. On appeal, the Court of Appeals for the Sixth Circuit reversed (in part), saying:

> "We believe the complaint states a cause of action under *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotis*, 403 U.S. 388 (1971). We recognize that *Bivens* dealt with a Fourth Amendment violation, but its logic appears to us to be equally applicable to a First Amendment violation." *Yaimouyiannis* v. *Chemical Abstracts Service*, 521 F.2d 1392, 1393 (6th Cir. 1975).

It was noted that essential to the cause of action was a showing of "state action," that is, sufficient activity of

the federal government to bring the First Amendment into play, and that this question presented a matter of fact on which findings would have to be made. Accordingly, the judgment of the District Court was reversed, and the case was remanded.

On December 20, 1976, the cause was brought before Hon. Carl B. Rubin, District Judge, who first empaneled, then temporarily dismissed, a jury, following which he heard facts relating to the issue of "government action." (But see *Curtis* v. *Loether,* 415 U.S. 189 (1974).) The Court found that Chemical Abstracts Service is a division of the American Chemical Society, a corporation established by Act of Congress on August 25, 1937, 50 Stat.L. 798; that the operations of Chemical Abstracts Service and the real estate used in such operations are exempt from state and federal taxation; that the American Chemical Society makes annual reports to Congress; that agencies of the federal government purchase substantial, though less than twenty percent, of the services made available by Chemical Abstracts Service; and that Chemical Abstracts Service regularly contracts with, or receives grants from, the federal government.

It may be noticed, although the Court did not specifically so find, that the statutory act of incorporation says the American Chemical Society shall "promote scientific interests and inquiry, thereby fostering public welfare and education, aiding the development of our country's industries, and adding to the material prosperity and happiness of our people," Chapter 762, § 2, 50 Stat.L. at 798-99; "whenever called upon by the War and Navy Department, investigate, examine, experiment, and report upon any subject in pure and applied chemistry connected with the national defense, the actual expense of such investigations, examinations, experiments, and reports to be paid from

appropriations which may have been made for that purpose by Congress," Chapter 762, § 4, 50 Stat.L. at 799; "on or before the 1st day of December in each year, transmit to Congress a report of its proceedings and activities for the preceding calendar year, Chapter 762, § 8, 50 Stat.L. at 800. The statute further provides, "that the title to any and all inventions and discoveries made in the course of such investigations, examinations, and experiments that, in the opinion of the Secretary of the Navy or the Secretary of War, involve the national defense, shall vest in the government of the United States, and the Government of the United States shall have unlimited license under all other inventions and discoveries." Chapter 762, § 4, 50 Stat.L. at 799.

The District Court concluded, as a matter of law, that these facts did not constitute federal action, and dismissed the suit once again. Judgment was entered on December 21, 1976.

An appeal was taken to the United States Court of Appeals for the Sixth Circuit, which affirmed the judgment of the District Court on June 29, 1978.

REASONS TO ALLOW WRIT

The American Chemical Society is an instrumentality of the federal government, and is a public corporation. The conduct of the agents thereof in the scope of employment are therefore action of the federal government. Insofar as the acts complained of were injurious to the constitutional right of the Plaintiff to speak in public on a subject of great importance to the health and welfare of his countrymen, the Plaintiff has stated a cause of action for damages, and has a right to jury trial on the merits of his claim.

I.

In *Bivens* v. *Six Unknown Agents* 403 U.S. 388 (1971), it was established that, even in the absence of express congressional creation of a statutory cause of action, a citizen who has suffered the indignities of a breach of the Fourth Amendment by federal agents acting in the scope of employment has a federal cause of action, judicially fashioned, against the wrongdoers, for money damages.

The origins of the Fourth Amendment are usually traced to principles of common law enunciated by the great James Otis in his oration against the use of vice-admiralty writs of assistance to enforce trade laws. *Draxton's Case,* Quincy's Rep. 51 (Mass. 1761). Shortly thereafter, general warrants were held to be null and void; those who wrongfully procured and used such writs were found liable at common law for compensatory and punitive damages. *Wilkes* v. *Wood,* 2 Wils. 151 (K.B. 1763); *Huckle* v. *Money,* 2 Wils. 205 (C.P. 1763).[1] Therefore, the judicial

[1] For a clear account, see Judge Cooley's *Constitutional Limitations,* 8th Ed. 1927, Vol. 1, pp. 610-618.

remedy of money damages for unconstitutional searches and seizures by federal agents follows naturally from the logic and the history of the Fourth Amendment. And if there is a judicially created remedy for breaches of the Fourth Amendment, then, as even the Court below has noted, the same must be true for the First Amendment, or any other constitutionally guaranteed freedom, especially those enumerated in the Bill of Rights. *Yiamouyiannis* v. *Chemical Abstracts Service,* 521 F.2d 1392, 1393 (6th Cir. 1975).

II.

The definition of the wrong is the United States Constitution, while the remedy is work of the judiciary. By comparison, in the area of private torts, both the wrong and the remedy derive from state common law. The most distinctive feature of this "constitutional tort" is that activity of the federal government, or of its officers or instrumentalities, is essential; otherwise, the federal Bill of Rights cannot be brought into play.

Hence, we have a "federal action" question analogous to the "state action" issues so frequently encountered under the Fourteenth Amendment where causes of action have been created by statute.

In order to prevail, the Plaintiff must show that his freedom of speech, as defined in the First Amendment, was impaired; and that he was thus wronged by a federal instrumentality or agents thereof acting in the scope of employment.

III.

It is tempting to resort immediately to cases under the Fourteenth Amendment for guidance. Ever since the *Civil Rights Cases,* 109 U.S. 3 (1883), it has been recognized that there can be no redress, nor any civil or criminal wrong, premised on that constitutional provision, unless and until "state action" is shown; the provision says that no state shall deny privileges and immunities, due process, and equal protection. True enough, there must likewise be "federal action" to sustain suits brought under *Bivens* v. *Six Unknown Agents.* However, automatic, indiscriminate reference to "state action" cases is misleading, particularly where corporations are involved, because of distinct differences in state and federal powers to incorporate.

The several states, in the sphere marked out by the Tenth Amendment, have general power of legislation; they may incorporate either governmental (public) instrumentalities or private institutions. In the classic case of *Dartmouth College* v. *Woodward,* 17 U.S. (4 Wheat.) 518 (1819), Chief Justice John Marshall distinguished between a public corporation, which, by definition, is "a civil institution, to be employed in the administration of the government" and "a private, eleemosynary institution, with a capacity to take property, for objects unconnected with government," 17 U.S. (4 Wheat.) at 629-30. A public corporation, he said, may be altered by state law, but a private corporation may not be so changed in essential terms, by reason of the Contract Clause in Article I, § 10 of the United States Constitution. As to Dartmouth College, a private corporation, he said:

> ". . . this being does not share in the civil government . . . Its immortality no more confers on its political power, or a political character, than immortality would confer such power or character on a natural person. It is no more a state instrument, than a natural person exercising the same powers would be." 17 U.S. (4 Wheat.) at 636.

Thus, *Dartmouth College* teaches us that while the acts of a public corporation are, or tend to be, governmental, the contrary is true of private corporations.

IV.

The American Chemical Society is chartered by Congress. The leading case on the subject of federal power to incorporate is *M'Culloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316 (1819), wherein it was held by Chief Justice Marshall that Congress has constitutional power to establish a federal bank, as a necessary and proper means to promote, by creation of a corporate vehicle, taxation and spending for the common defense and general welfare, regulation of the supply of purchasing media and thereby interstate commerce, etc. The case draws from the famous debate between Hamilton and Jefferson, then members of Washington's cabinet, over whether Congress can charter corporations, in view of the absence of express power to do so. See J. Elliot (Ed.), *Debates on the Federal Constitution,* 2nd Ed. 1859, Vol. 4, pp. 608-620, Vol. 5, pp. 439-440, 543-544; and J. Cooke (Ed.), *Reports of Alexander Hamilton,* Harper & Row, New York, 1964, pp. 83-114. The answer is that Congress has implied power to establish corporations, but only as instrumentalities for execution of enumerated federal powers. As a general rule then, in contrast to the several states, there is no power of Congress to charter private corporations. To the extent that this generality holds — and the exceptions are very few — every properly established federal corporation is a public

instrumentality of federal power, and thus the operations thereof are exempt from state taxation under the doctrine of intergovernmental immunities.[2] See *M'Culloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316, 425-437 (1819).

V.

The governmental attributes of federal corporations exist, even when privately funded in largest part. The Act of Congress which incorporated the Second Bank of the United States, 3 Stat.L. 266 (1816), and at issue in *M'Culloch* v. *Maryland,* provided that the federal government should own only one-fifth of the stock, and elect only one-fifth of the directors; but that otherwise the institution should be privately owned and controlled. In law, federal funding is not essential to the public character of federal corporations: the determinative factor is the necessarily public purpose of serving the execution of enumerated powers of the general government of the union. Absent such purpose, the constitutionality of a congressional character of incorporation cannot be sustained under the theory described by Chief Justice Marshall.

For a moment, consider the Acts of Congress which established the Veterans of Foreign Wars, 49 Stat.L. 1390 (1936), and 67 Stat.L. 40 (1953). These statutes authorize corporate activities to promote the morale of, and provide assistance to, military veterans and their families. Virtually everything done by this federal corporation is privately financed. Yet, because the power of Congress to grant the charter to create a necessary and proper means to maintain the Army and Navy of the country, the Veterans of Foreign Wars is a public corporation — in the words of John Marshall, "a civil institution, to be employed in the administration of the government" — hence, what the organization does is "federal action." Indeed, the prestige of the corporation derives from her congressional charter and public purpose. Thus, a veteran expelled because of speeches against the Vietnam War would most certainly have a right to sue for deprivation of constitutional liberty under the theory of *Bivens* v. *Six Unknown Agents.* Similarly, a state government may not attempt to tax the corporate operations of the Veterans of Foreign Wars.

The power of Congress to incorporate the American Chemical Society is implied as a necessary and proper means of acquiring information and intellectual property in order to maintain the armed forces, and, perhaps also, to regulate commerce, and establish uniform weights and measures. The constitutional theory of requisite federal power to create the corporation derives solely from *M'Culloch* v. *Maryland,* and nowhere else. The public nature of the institution, together with immunity from state taxation, follows as a matter of inexorable inference. The substantial federal purchases, contracts, the grants enjoyed by the corporation are unnecessary to establish the American Chemical Society as an instrumentality of the federal government; yet these considerations should serve to rebut any pretense or claim that the organization is a mere private, eleemosynary institution.

[2]Congress can, of course, incorporate private institutions within the District of Columbia, under Article I, § 8, Clause 17, of the United States Constitution. This appears to be the justification for the federal act of incorporation of the Boy Scouts of America, 39 Stat.L. 1390 (1916), the first section of which proclaimed, "a body corporate and politic of the District of Columbia where its domicile shall be." Another possible area of exception might be our modern-day national banks; but, even this is doubtful, since these appear to be premised on the power of Congress to provide uniform currency for the country. See, *Veazie Bank* v. *Fenno,* 75 U.S. (8 Wall.) 533, 548-9 (1869).

VI.

It follows from this alone that acts attributable to the American Chemical Society constitute "government action" required to bring the federal Bill of Rights (and the principle of *Bivens* v. *Six Unknown Agents*) into play. Being mindful of the differences between the state and federal powers of incorporation, the two leading "state action" cases support, rather than weaken, this conclusion.

The first of these is *Moose Lodge* v. *Irvis*, 407 U.S. 163 (1972), which held that where a private membership club or corporation refuses to serve liquor on the basis of race, there is no "state action" sufficient to bring the Fourteenth Amendment into operation simply because the liquor license was granted by a state agency.

The other is *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), which held that where the private lessee of a public corporation of Delaware refuses service of food on account of race, there is the required "state action" to make the Fourteenth Amendment applicable.

The distinguishing factor, which makes these otherwise similar cases different, yet consistent in principle, is that in *Irvis* the corporation was private, while in *Burton* the corporation was public. A tangible legal connection with a public corporation will convert a normally private deed into a matter of "government action," so as to make constitutional provisions operative, and open the way for civil rights litigation. In *Burton*, the connection was a lease with a public corporation. Here, the connection is the acts of corporate agents of the public corporation creating liability under the doctrine of *respondeat superior*, a far more direct relation.

The critical factor in this case is not possible pressure

from a department of the federal government, nor the use of federal funds, but the fact that the American Chemical Society is an instrument of federal power, and a public corporation. It was the failure to appreciate this point which led to the erroneous dismissal in the District Court.

CONCLUSION

The plaintiff has established the requisite "government action" as a matter of law. The judgment below should be reversed, and the cause remanded to the District Court in order that the Plaintiff may proceed to prove the facts of deprivation of free speech, and consequent damages, before a jury.

Respectfully submitted,

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APPENDIX

Dr. John YIAMOUYIANNIS,
Plaintiff-Appellant,

v.

CHEMICAL ABSTRACTS SERVICE et al.,
Defendants-Appellees.

No. 75-1044

United States Court of Appeals,
Sixth Circuit.

Argued June 10, 1975.

Decided Sept. 15, 1975.

Biochemist who had been threatened with firing if he made any more speeches where his opposition to use of fluorides in drinking water was identified with his employer and who resigned after being placed on probationary status brought action alleging that he was coerced into his "discharge" in violation of First Amendment rights. The United States District Court for the Eastern District of Ohio, Eastern Division, Joseph P. Kinneary, Chief Judge, granted summary judgment for defendants and plaintiff appealed. The Court of Appeals held that questions of fact existed as to whether employer was federally funded to the extent that the discharge was state action and as to whether the Department of Health, Education and Welfare exerted financial pressure upon employer to silence or fire plaintiff and as to whether plaintiff was discharged in violation of First Amendment rights or resigned voluntarily.

Affirmed in part and reversed in part and remanded.

1. Federal Civil Procedure —2497

Questions of fact existed as to whether plaintiff, a biochemist who had been threatened with firing if he made any more speeches where his opposition to use of fluorides in drinking water was identified with employer, and who resigned after being placed on probationary status, was discharged or resigned voluntarily and as to whether employer was federally funded to the extent that the discharge was "state action," and as to whether the Department of Health, Education and Welfare exerted financial pressure upon employer to silence or fire plaintiff, precluding summary judgment in suit for violation of First Amendment rights. U.S.C.A.Const. Amend. 1.

2. Courts —282(9)

Federal district court had jurisidiction under federal question statute in action by plaintiff who alleged that his discharge in violation of First Amendment rights constituted state action. 28 U.S.C.A. § 1331.

3. Constitutional Law —46(2)

Complaint of biochemist alleging that his discharge by federally funded employer after being warned that he would be fired if he made any more speeches where his opposition to use of fluorides in drinking water was identified with employer sufficiently set forth governmental action to state cause of action. U.S.C.A.Const. Amend. 1.

Phillip D. Cameron, Worthington, Ohio, for plaintiff-appellant.

Bruce G. Lynn, Michael J. Renner, Bricker, Evatt, Barton & Eckler, William W. Milligan, U. S. Atty., Columbus, Ohio, for defendants-appellees.

Before PHILLIPS, Chief Judge and EDWARDS and McCREE, Circuit Judges.

PER CURIAM.

Appellant appeals from summary judgment granted all defendants by the United States District Court for the Southern District of Ohio.

Plaintiff-appellant Dr. Yiamouyiannis was a Ph.D in biochemistry, employed by Chemical Abstracts Service (CAS), a division of the American Chemical Society, located on the campus of Ohio State University at Columbus. He was employed in the business of abstracting articles on chemical topics for CAS which then sold its publication to individuals, companies and governmental agencies. In 1969 and 1970 he gave talks to various groups concerning his views on fluoridation. He expressed vigorous opposition to the use of fluorides in drinking water. This resulted in at least some attention from the Department of Health, Education and Welfare, which through its dental division had taken a strong position in favor of fluordiation. Dr. Yiamouyiannis alleges that this had an immediate effect upon CAS, "coercing" them into his "discharge."

CAS warned plaintiff on August 10, 1970, that if he made any more speeches where his opposition to fluoridation was identified with CAS, he would be fired. On March 30, 1972, he was placed on probationary status with CAS saying that his work was not what it should be. On March 31, 1972, plaintiff resigned and brought the instant action.

The District Court granted motions for summary judgment, concluding that the plaintiff had not alleged sufficient governmental action to support a First Amendment claim. This summary judgment cannot be affirmed since there are, as we see it, continuing questions of fact. *See S. J. Groves & Sons Co.* v. *Ohio Turnpike Comm'n,* 315 F.2d 235 (6th Cir.), *cert. denied,* 375 U.S. 824, 84 S.Ct. 65, 11 L.Ed.2d 57 (1963).

[1] Fundamental to appellant's cause of action, of course, is proof that his discharge was "state action." In this regard appellant contends (and appellee denies) that CAS is federally funded to the extent that his discharge must be regarded as governmental action. Alternatively appellant contends (and appellee denies) that the HEW exerted financial pressure upon CAS to silence or fire appellant. These assertions and denials pose questions of fact upon which findings must be made.

If these questions are answered favorably to appellant, there must also be a finding of fact as to whether appellant was, in practical effect, discharged or whether, as appellee contends, he resigned voluntarily.

Assuming these preliminary questions are resolved in appellant's favor, the District Court will still be confronted by still more difficult questions underlying appellant's contention of a First Amendment violation. These appear to include 1) whether or not appellant was discharged because of his speeches, and 2) if so, whether or not appellant's speeches created sufficient confusion about the official position of fluordiation policy of CAS, HEW, or both, to justify the threat of appellant's discharge if CAS "received one more such connection between his talks and CAS."

As is obvious from what is said above, appellant has a tough row to hoe in order to establish a case for relief

arising from a First Amendment violation. But we feel that he is entitled to try.

[2, 3] The District Court has jurisdiction of this action under 28 U.S.C. § 1331 (1970). *See also Bell* v. *Hood,* 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946). We believe the complaint states a cause of action under *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). We recognize that *Bivens* dealt with a Fourth Amendment violation, but its logic appears to us to be equally applicable to a First Amendment violation. *See generally Moore* v. *Koelzer,* 457 F.2d 892 (3d Cir. 1972); *States Marine Lines, Inc.* v. *Shultz,* 498 F.2d 1146 (4th Cir. 1974).

Summary judgment was clearly appropriate as to all other aspects of this case.

The judgment of the District Court is affirmed in part and reversed in part and remanded to the District Court for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION – CIVIL ACTION

12-45

DR. JOHN YIAMOUYIANNIS,
6439 Taggart Road, Delaware, Ohio 43015,
Plaintiff,

vs.

CHEMICAL ABSTRACTS SERVICE,
a Division of American Chemical Society a Corporation organized under an Act of Congress, 2540 Olentangy River Road, Columbus, Ohio, et al.,
Defendants.

COMPLAINT

(Filed November 6, 1972)

Count 1.

1) Jurisdiction is founded on the existence of a Federal question and amount in controversy:

a. The action arises under the Constitution of the United States, the 1st Amendment to the Constitution of the United States, as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars, 28 U.S.C.A. Section 1331.

b. Jurisdiction is also founded on the existence of a question arising under particular statutes.

The action arises under the Act of Congress, 42 U.S.C.A. Section 1985 and jurisdiction is founded on 28 U.S.C.A. Section 1343.

2) Plaintiff is and has been a citizen of the United States during the time of the entire proceedings which are the subject matter of this complaint and has been employed by the Chemical Abstracts Service, a division of the American Chemical Society, a corporation organized under an Act of Congress, as an Associate Editor.

3) Plaintiff says that on or about March 1, 1970 and continuing through April 1, 1972, he was deprived of his constitutionally protected right of freedom of speech and equal protection of the laws and his privileges and immunities under the laws by concerted action of the Division of Dental Health, Department of Health, Education and Welfare of the United States Government, Chemical Abstracts Service, a division of the American Chemical Society, Dale B. Baker, Fred A. Tate, Russell J. Rowlett, Jr., Roger Moody, John C. Young, William E. Nutter and other persons in violation of 42 U.S.C.A. Section 1985 and the 1st Amendment to the Constitution of the United States.

4) Plaintiff Dr. Yiamouyiannis, a Ph.D. biochemist, is a recognized authority in the area of the effects of fluoride on man and other living organisms. He has made public talks and debates and has written articles reflecting his belief that fluoride at the levels used to fluoridate public water systems has adverse effects on the human body; in recent years, more and more evidence from the chemical literature of the world supports his contentions (a case in point is that Sweden has done away with fluoridation of public water systems).

5) Dale B. Baker, the director of Chemical Abstracts

Service, a B.S. in Chemical Engineering, is a well-known proponent of fluoridation. The plaintiff alleges that upon learning of the antifluoridation activities of Dr. Yiamouyiannis. Dale B. Baker conspired with Russell J. Rowlett, Jr. to stop Dr. Yiamouyiannis from communicating his ideas on the subject.

6) The United States Department of Health, Education and Welfare has actively supported fluoridation of public water systems and has refused to support any research on the toxic effects of fluoride at levels used to fluoridate public water systems (to such an extent that now most of the better studies of the effects of low levels of fluoride are coming from foreign countries). The plaintiff alleges that the Department of Health, Education and Welfare ran an investigation on him and finally communicated with the highest officials at Chemical Abstract Service and threatened that Department of Health, Education and Welfare funds amounting to 1.1 million dollars might be in jeopardy if they did not silence or get rid of Dr. Yiamouyiannis in some way.

7) Russell J. Rowlett, Jr. confronted Dr. Yiamouyiannis not less than three (3) times. At these meetings, Dr. Yiamouyiannis was informed that Dale B. Baker was a staunch supported of fluoridation and that it would have been all right for him to have spoken out on almost any other issue. On August 10, 1970, Russell J. Rowlett, Jr. called Dr. Yiamouyiannis in to tell him if he made any more communications concerning fluoride, even if it be personal conversation or not or if he spoke in public again whether or not fluoride was involved that he would lose his job at Chemical Abstracts Service.

8) Since his first article on fluoridation, Dr. Yiamouyiannis has been harassed by John Young, Roger Moody

and others in lower management; his raises have been modified or turned down by Fred A. Tate because of Dr. Yiamouyiuannis' public statements regarding fluoride.

Dr. Yiamouyiannis never allowed his name to be associated with Chemical Abstract Service and the only case where his name did appear together with Chemical Abstracts Service was in a *Citizen Journal* article where he expressly forbade the *Citizen Journal* to use a reference to Chemical Abstracts Service.

9) Plaintiff alleges that the conduct of these defendants constitutes an unlawful deprivation of his constitutional right of freedom of speech. Such speech is significant speech in that fluoridation is a topic of public concern and Dr. Yiamouyiannis is a well-qualified and informed speaker on this topic. A citizen's right to engage in protracted expression is substantially unaffected by the fact that his views are in opposition to the political views of any federal agency that funds his employer, which in this case is a governmentally created corporation by Act of Congress August 25, 1937.

10) Plaintiff alleges that said conduct is in violation of the First Amendment to the Constitution of the United States which guarantees a citizen's right to freedom of speech. Plaintiff further alleges that this activity constitutes a conspiracy of two or more persons to deprive Dr. Yiamouyiannis of his constitutional and civil rights freedom of speech and of his right of equal immunities and privileges under the laws.

Count 2.

11) Plaintiff incorporates all allegations of Count 1. of the Complaint into Count 2. of the Complaint.

12) Plaintiff says that John C. Young, Roger Moody, William E. Nutter and other persons conspired together to falsify Dr. Yiamouyiannis' performance record at Chemical Abstract Service. Said statements in writing constituted libel and slander and falsely indicated that Dr. Yiamouyiannis' work was not comparable to that expected of an editor with nearly 3½ years experience and that his work contained frequent editing errors both with respect to chemical and grammatical content, that Dr. Yiamouyiannis' work indicated carelessness, that Dr. Yiamouyiannis read the newspaper excessively at work, excessively used departmental telephones, and excessively visited other employees. All said statements are totally false. Dr. Yiamouyiannis' work was of comparable quality to that of others in the department; his production was above average in the department. He did not excessively use the telephone, he did not excessively visit other employees, and he was, in fact, an intelligent and excellent worker.

13) Plaintiff further alleges that these falsities were contributed to with the direction and consent of certain high officials in the Chemical Abstracts Service in order to force Dr. Yiamouyiannis out of Chemical Abstract Service. Certain persons within the Department of Health, Education and Welfare have taken a position of supporting fluoridation of water, a position that Dr. Yiamouyiannis has freely spoken against. Chemical Abstracts Service receives massive funding from the Department of Health, Education and Welfare and instituted this malicious program to discredit Dr. Yiamouyiannis to satisfy certain persons within the Department of Health, Education and Welfare.

14) Plaintiff alleges that the defendants employed by Chemical Abstracts Service were acting within the scope

of their employment in their dealings with Dr. Yiamouyiannis.

15) As a result of the conduct of the defendants the plaintiff has been threatened, intimidated, and coerced and was deprived of his freedom of speech regarding the reasonable subject of fluoridation of water, and furthermore was restrained from making any public utterance regardless of content; he has been slandered and libeled regarding the quality and quantity of his work and has been humiliated among his fellow workers. Plaintiff was further harassed out of the Chemical Abstracts Service and submitted his resignation under great pressure on March 31, 1972.

16) Plaintiff has lost six months pay and has been denied no less than two salary increases with a resultant loss of $10,900.00.

Plaintiff has also suffered severe mental and nervous strain, family disruption, as well as permanent damage to his career and reputation as a biochemist. Dr. Yiamouyiannis has spent seven (7) years of his life in schools preparing for his career as a biochemist.

WHEREFORE, plaintiff prays for judgment against the defendants for $3,885,900.00, attorneys' fees, and costs in this action.

/s/ PHILLIP D. CAMERON
Philip D. Cameron
6649 North High Street
Worthington, Ohio 43085
846-2946

Approved:
/s/ JOHN YIAMOUYIANNIS
John Yiamouyiannis, Ph.D.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-3-76-54

DR. JOHN YIAMOUYIANNIS,
Plaintiff,

vs.

CHEMICAL ABSTRACTS SERVICE, ET AL.,
Defendants.

ORDER

(Filed December 21, 1976)

This matter is before the Court under the following circumstances. On September 15, 1975, the United States Court of Appeals reversed that portion of a Summary Judgment previously granted to defendants which found insufficient governmental action to support a First Amendment claim. *Yiamouyiannis* v. *Chemical Abstract Service*, 521 F.2d 1392. The mandate of that Court returned the matter to the District Court for further proceedings. The opinion at page 1398 contains the following language:

> Fundamental to a appellant's cause of action, of course, is proof that his discharge was 'state action'.

In accordance with the mandate of the United States Court of Appeals for the Sixth Circuit an opportunity was given to plaintiff to present all relevant evidence either to prove that his discharge was "state action" or that the Department of Health, Education and Welfare exerted financial pressure upon defendant to silence or fire plaintiff: In open Court testimony was adduced, exhibits were admitted and comprehensive trial memoranda filed on the issue of state action. Counsel called to the Court's attention depositions of Dr. Quentin Miller Smith, Jr. and John Small. Both of such depositions have been read by the Court.

In support of plaintiff's position the following assertions were made:

1. Defendant Chemical Abstracts Service, a division of American Chemical Society, was chartered by an Act of Congress.
2. Prior to 1965 Chemical Abstract Service was a resident on the Ohio State University campus in a building rented to them by the University.
3. Defendant conducted joint and mutual endeavors with Ohio State University and staff privileges were accorded to employees of defendant.
4. Defendant Chemical Abstract Service used the name of Ohio State University on its journal.
5. Defendant Chemical Abstract Service was viewed in the community as a part of Ohio State University.
6. In 1971 Chemical Abstract Service transferred property to Franklin County, Ohio and leased it back in return for the issuance of Industrial Development Bonds secured by revenues derived from lease payments by defendant.
7. Defendant in 1972 entered into a similar arrangement with Franklin County, Ohio, for the purpose of financing its computers.

8. Between 1965 and 1972 twenty percent of the income of defendant came from grants and contracts of agencies of the United States.
9. Agencies of the federal government are the largest users of abstracts and tapes generated by defendant.
10. Defendant makes an annual report to the Congress of the United States.
11. Defendant is exempt from federal and state taxation.
12. The actions of defendant Chemical Abstract Service were influenced by the Department of Health, Education and Welfare.

The foregoing assertions may be grouped into three categories: those concerned with the federal government, those concerned with Ohio State University and those concerned with Franklin County, Ohio.

This Court will accept as its definition of "state action" that of the Supreme Court of the United States in *Jackson* v. *Metropolitan Edison Company*, 419 U.S. 345 (1974). At page 351 the following appears: "In order to bring an otherwise private entity within the coverage of the Fourteenth Amendment there must be a sufficiently close nexus between the state and the challenged action . . . so that the action of the latter may be fairly treated as that of the state iself."

The activities involving Ohio State University lack credible evidence. Other than the former rental of premises and the use of a postal station at or near the Ohio State University campus, no evidence was presented as to any connection with Ohio State University or any participation by it in the policies and operation of Chemical Abstract

Service. Viewing plaintiff's evidence in a light most favorable to him, it cannot be said that any dealings with Ohio State University rise to the level of "state action". As evidence of state action, assertions two, three, four, and five fail for lack of proof.

In accordance with Ohio Revised Code Chapter 165 counties may issue Industrial Development Bonds secured by revenues from the projects themselves. These are not full faith and credit bonds and depend for security upon a specific project. Franklin County, Ohio has issued such bonds, pledging lease payments by defendant. To secure such payments, it acquired title to certain real estate belonging to the defendant and certain personal property as well. The transfer of real estate and the lease-back is an unusual transaction only in that the lease agreement, Plaintiff's Exhibit 87, specifically provides for the return of the premises to defendant when the bonds have been retired. While this transaction is designated as a transfer of title and a lease-back, the requirement of retransfer identifies the transaction more nearly as a mortgage than as a sale of real estate. The proceedings of Franklin County, Ohio were in accordance with Ohio Revised Code Chapter 165 and served only to secure the notes issued by such county. No evidence has been presented that Franklin County or its officials participated in any fashion in any decisions made by defendant, sat upon any board or governing body or were involved in any policy determinations. The fact alone of the issuance of revenue bonds does not constitute state action. *Compare O'Neill* v. *Grayson County War Memorial Hospital*, 472 F.2d 1140 (6th Cir. 1973) *with Jackson* v. *Norton Children's Hospitals, Inc.*, 487 F.2d 502 (6th Cir. 1973). As evidence of "state action" assertions six and seven fail for lack of proof.

Defendants have stipulated that the American Chemical

Society was chartered by an Act of Congress in 1937 (Assertion 1) and that Chemical Abstracts Service is a division thereof. Plaintiff has established that Chemical Abstracts Service is exempt from state and federal taxation and is exempt from taxation on those parcels of its real estate which are used in its business. (Assertion 11) A copy of defendant's annual report is filed with the Congress of the United States as are the annual reports of other such chartered corporations. (Assertion 10) While agencies of the federal government are users of the services of defendant, less than twenty percent of the purchasers of its services are governmental agencies. (Assertion 9) Defendant does contract with agencies of the United States and has received one grant. (Assertion 8)

The totality of the foregoing in terms of "state action" by the United States must be examined in accordance with appropriate judicial determinations. The questions of chartering, financial aid in the form of public funds and the granting of tax exemptions has been disposed of by the United States Court of Appeals for the Sixth Circuit in the case of *Blackburn* v. *Fisk University*, 443 F.2d 121. At page 123 the following statement was made: "State involvement sufficient to transform a 'private' university into a 'state' university requires more than merely chartering the university. *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819); providing financial aid in the form of public funds, *Grossner* v. *Trustees of Columbia University*, 287 F.Supp. 535 (S.D. N.Y. 1968); or granting of tax exemptions, *Brown* v. *Mitchell*, 409 F.2d 593 (10th Cir. 1969)." *See also Greenya* v. *George Washington University*, 512 F.2d 5566 (D.C. Cir. 1975).

Partial funding does not create state action. "Whenever state action has been discovered in the activities of an ostensibly private hospital something more than partial

federal funding is involved." *Jackson* v. *Norton Children's Hospitals, Inc.*, 487 F.2d 503 (6th Cir. 1973). As evidence of state action assertions, one, eight, nine, ten and eleven fail for lack of proof.

While all the foregoing is insufficient as a matter of law to establish state action, it should be noted that plaintiff also asserts that the Department of Health, Education and Welfare exerted financial pressure upon the defendant to silence or to fire him. (Assertion 12) This, he contends, is also "state action". This Court listened to the evidence presented by the plaintiff, examined the documents asserted by the plaintiff to support this view and read the depositions of both Dr. Quentin Miller Smith, Jr. and John Small. Plaintiff's assertions on this point can only be characterized as mere speculation and innuendo.

The complaint in this matter was filed November 6, 1972. In the four years that have ensued plaintiff has apparently been unable to produce one document or one witness in support of his claim that pressure by a governmental agency was asserted against the defendant in this case. To the contrary, all witnesses who testified either directly in open court or by deposition specifically and categorically denied that any such pressure was ever exerted.

Taken at is [sic] best plaintiff's unsupported testimony fails to involve any employee of any federal agency. As a matter of law such testimony alone does not constitute state action. As evidence of state action assertion twelve must fail for want of proof.

There being no evidence of state acion in this matter, plaintiff has failed to state a cause of action upon which relief may be granted.

CONCLUSIONS OF LAW

A. Whether a complaint states a cause of action upon which may be granted is a question of law. *Bell* v. *Hood*, 327 U.S. 678 (1946).

B. The rental of premises upon the campus of a state university and the use of a United States Postal Service station on such campus does not constitute state action.

C. The issuance by a county of Industrial Development Bonds and the transfer to such county during the lifetime of such bonds of real estate and certain personalty by a private entity does not constitute state action.

D. The chartering by Congress of a public corporation, the entrance into contracts with government agencies, the granting of tax exempt status and partial funding through grants and contracts do not constitute state action.

E. In the absence of a showing of a sufficiently close nexus between the state and a private entity so that the action of such entity may be fairly treated as that of the state itself, no symbiotic relationship has been created sufficient to establish state action. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974).

F. Plaintiff having failed to establish a cause of action upon which relief may be granted, the complaint herein should be and is hereby DISMISSED.

LET JUDGMENT ISSUE IN ACCORDANCE WITH THE FOREGOING.

/s/ CARL B. RUBIN
Carl B. Rubin
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-3-76-54

DR. JOHN YIAMOUYIANNIS,
Plaintiff,

vs.

CHEMICAL ABSTRACTS SERVICE, ET AL.,
Defendants.

JUDGMENT

(Filed December 21, 1976)

This action came on for trial before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered.

It is Ordered and Adjudged that the plaintiff take nothing, that the action herein is hereby DISMISSED as plaintiff having failed to establish a cause of action upon which relief may be granted. that the defendants, Chemical Abstracts Service, et al, recover of plaintiff, Dr. John Yiamouyiannis, their costs of action.

Dated at Dayton, Ohio, this 21st day of December, 1976.

JOHN D. LYTER
Clerk of Court

By: /s/ REBECCA J. ELLIS
Rebecca J. Ellis, Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-3-76-54

DR. JOHN YIAMOUYIANNIS,
Plaintiff,

vs.

CHEMICAL ABSTRACTS SERVICE, ET AL.,
Defendants.

NOTICE OF APPEAL

(Filed January 14, 1977)

Notice is hereby given that the Plaintiff, Dr. John Yiamouyiannis, appeals to the United States Court of Appeals for the Sixth Circuit from the judgment entered in this action on the 21st day of December, 1976.

/s/ ROBERT E. MANLEY
Robert E. Manley
Attorney for Plaintiff
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Telephone: (513) 721-5525

John R. Graham
Attorney for Plaintiff
Hamline University Law School
St. Paul, Minnesota 55104

OF COUNSEL:

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Timothy A. Fischer
4500 Carew Tower
Cincinnati, Ohio 45202

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-3-76-54

Plaintiff,
DR. JOHN YIAMOUYIANNIS,

vs.

CHEMICAL ABSTRACTS SERVICE, ET AL.,
Defendants.

AMENDED ORDER

(Filed January 19, 1977)

This matter is before the Court under the following circumstances. On September 15, 1975, the United States Court of Appeals reversed that portion of a Summary Judgment previously granted to defendants which found

insufficient governmental action to support a First Amendment claim. *Yiamouyiannis* v. *Chemical Abstract Service,* 521 F.2d 1392. The mandate of that Court returned the matter to the District Court for further proceedings. The opinion at page 1393 contains the following language:

> Fundamental to a appellant's cause of action, of course, is proof that his discharge was 'state action'.

In accordance with the mandate of the United States Court of Appeals for the Sixth Circuit an opportunity was given to plaintiff to present all relevant evidence either to prove that his discharge was "state action" or that the Department of Health, Education and Welfare exerted financial pressure upon defendant to silence or fire plaintiff.[1]

In open Court testimony was adduced, exhibits were admitted and comprehensive trial memoranda filed on the issue of state action. Counsel called to the Court's attention depositions of Dr. Quentin Miller Smith, Jr. and John

[1] To place this matter in appropriate perspective it is advisable to review the situation that gave rise to this litigation. This recitation by the Court should not be deemed as a finding of fact.

Defendant Chemical Abstracts Service is a division of the American Chemical Society. For a number of years it has occupied premises in Columbus, Ohio, providing an abstracting service to industry, to government agencies and to educational institutions of developments in matters pertaining to chemistry.

Plaintiff, Dr. John Yiamouyiannis, is a former employee of Chemical Abstracts Service. Prior to March 31, 1977 he served as an associate editor in the biochemical area of the abstracting section. On several occasions during 1970 Dr. Yiamouyiannis publically spoke and wrote on the subject of fluoride addition to water supplies. A controversy arose between the plaintiff and his superiors regarding such writings and appearances. On March 31, 1972 Dr. Yiamouyiannis terminated his relationship with defendant.

The merits of the controversy and the facts surrounding it are not at this point at issue before the Court. The threshold question of state action was the sole subject of the hearing and is the sole subject of he above Order.

Small. Both of such depositions have been read by the Court.

In support of plaintiff's position the following assertions were made:

1. Defendant Chemical Abstracts Service, a division of American Chemical Society, was chartered by an Act of Congress.
2. Prior to 1965 Chemical Abstract Service was a resident on the Ohio State University campus in a building rented to them by the University.
3. Defendant conducted joint and mutual endeavors with Ohio State University and staff privileges were accorded to employees of defendant.
4. Defendant Chemical Abstract Service used the name of Ohio State University on its journal.
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7. Defendant in 1972 entered into a similar arrangement with Franklin County, Ohio, for the purpose of financing its computers.
8. Between 1965 and 1972 twenty percent of the income of defendant came from grants and contracts of agencies of the United States.
9. Agencies of the federal government are the largest users of abstracts and tapes generated by defendant.

10. Defendant makes an annual report to the Congress of the United States.

11. Defendant is exempt from federal and state taxation.

12. The actions of defendant Chemical Abstract Service were influenced by the Department of Health, Education and Welfare.

The foregoing assertions may be grouped into three categories: those concerned with the federal government, those concerned with Ohio State University and those concerned with Franklin County, Ohio.

This Court will accept as its definition of "state action" that of the Supreme Court of the United States in *Jackson* v. *Metropolitan Edison Company,* 419 U.S. 345 (1974). At page 351 the following appears: "In order to bring an otherwise private entity within the coverage of the Fourteenth Amendment there must be a sufficiently close nexus between the state and the challenged action . . . so that the action of the latter may be fairly treated as that of the state itself."

The activities involving Ohio State University lack credible evidence. Other than the former rental of premises and the use of a postal station at or near the Ohio State University campus, no evidence was presented as to any connection with Ohio State University or any participation by it in the policies and operation of Chemical Abstract Service. Viewing plaintiff's evidence in a light most favorable to him, it cannot be said that any dealings with Ohio State University rise to the level of "state action". As evidence of state action, assertions two, three, four, and five fail for lack of proof.

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Defendants have stipulated that the American Chemical Society was chartered by an Act of Congress in 1937 (Assertion 1) and that Chemical Abstracts Service is a division thereof. Plaintiff has established that Chemical Abstracts Service is exempt from state and federal taxation and is exempt from taxation on those parcels of its real

estate which are used in its business. (Assertion 11) A copy of defendant's annual report is filed with the Congress of the United States as are the annual reports of other such chartered corporations. (Assertion 10) While agencies of the federal government are users of the services of defendant, less than twenty percent of the purchasers of its services are governmental agencies. (Assertion 9) Defendant does contract with agencies of the United States and has received one grant. (Assertion 8)

The totality of the foregoing in terms of "state action" by the United States must be examined in accordance with appropriate judicial determinations. The questions of chartering, financial aid in the form of public funds and the granting of tax exemptions has been disposed of by the United States Court of Appeals for the Sixth Circuit in the case of *Blackburn* v. *Fisk University,* 443 F.2d 121. At page 123 the following statement was made: "State involvement sufficient to transform a 'private' university into a 'state' university requires more than merely chartering the university. *Trustees of Dartmouth College* v. *Woodward,* 17 U.S. (4 Wheat.) 518 (1819); providing financial aid in the form of public funds, *Grossner* v. *Trustees of Columbia University,* 287 F.Supp. 535 (S.D.N.Y. 1968); or granting of tax exemptions, *Brown* v. *Mitchell,* 409 F.2d 593 (10th Cir. 1969)." *See also Greenya* v. *George Washington University,* 512 F.2d 556 (D.C.Cir. 1975).

Partial funding does not create state action. "Whenever state action has been discovered in the activities of an ostensibly private hospital something more than partial federal funding is involved." *Jackson* v. *Norton Children's Hospitals, Inc.,* 487 F.2d 503 (6th Cir. 1973). As evidence of state action assertions, one, eight, nine, ten and eleven fail for lack of proof.

While all the foregoing is insufficient as a matter of law to establish state action, it should be noted that plaintiff also asserts that the Department of Health, Education and Welfare exerted financial pressure upon the defendant to silence or to fire him. (Assertion 12) This, he contends, is also "state action". This Court listened to the evidence presented by the plaintiff, examined the documents asserted by the plaintiff to support this view and read the depositions of both Dr. Quentin Miller Smith, Jr. and John Small. Plaintiff's assertions on this point can only be characterized as mere speculation and inuendo.

The complaint in this matter was filed November 6, 1972. In the four years that have ensued plaintiff has apparently been unable to produce one document or one witness in support of his claim that pressure by a governmental agency was asserted against the defendant in this case. To the contrary, all witnesses who testified either directly in open court or by deposition specifically and categorically denied that any such pressure was ever exerted.

Taken at its best plaintiff's unsupported testimony fails to involve any employee of any federal agency. As a matter of law such testimony alone does not constitute state action. As evidence of state action assertion twelve must fail for want of proof.

There being no evidence of state action in this matter, plaintiff has failed to state a cause of action upon which relief may be granted.

CONCLUSIONS OF LAW

A. Whether a complaint states a cause of action upon which relief may be granted is a question of law. *Bell* v. *Hood*, 327 U.S. 678 (1946).

B. The rental of premises upon the campus of a state university and the use of a United States Postal Service station on such campus does not constitute state action.

C. The issuance by a county of Industrial Development Bonds and the transfer to such county during the lifetime of such bonds of real estate and certain personalty by a private entity does not constitute state action.

D. The chartering by Congress of a public corporation, the entrance into contracts with government agencies, the granting of tax exempt status and partial funding through grants and contracts do not constitute state action.

E. In the absence of a showing of a sufficiently close nexus between the state and a private entity so that the action of such entity may be fairly treated as that of the state itself, no symbiotic relationship has been created sufficient to establish state action. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974).

F. Plaintiff having failed to establish a cause of action upon which relief may be granted, the complaint herein should be and is hereby DISMISSED.

LET JUDGMENT ISSUE IN ACCORDANCE WITH THE FOREGOING.

/s/ CARL B. RUBIN
Carl B. Rubin
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-3-76-54

DR. JOHN YIAMOUYIANNIS,
Plaintiff,

vs.

CHEMICAL ABSTRACTS SERVICE, ET AL.,
Defendants.

AMENDED JUDGMENT

(Filed January 19, 1977)

This action came on for trial before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff take nothing, that the within action be dismissed.

Dated at Dayton, Ohio, this 19th day of January, 1977.

JOHN D. LYTER
Clerk of Court

BY: /s/ REBECCA J. ELLIS
Rebecca J. Ellis, Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-3-76-54

DR. JOHN YIAMOUYIANNIS,

Plaintiff,

vs.

CHEMICAL ABSTRACTS SERVICE, ET AL.,

Defendants.

AMENDED NOTICE OF APPEAL

(Filed January 24, 1977)

The Plaintiff, Dr. John Yiamouyiannis, hereby amends his Notice of Appeal filed in this action, and hereby appeals to the United States Court of Appeals for the Sixth Circuit from the judgment entered in this action on the 21st day of December, 1976, and from the amended order and amended judgment entered in this action on the 19th day of January, 1977.

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No. 77-3148

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN YIAMOUYIANNIS,
Plaintiff-Appellant,
v.
CHEMICAL ABSTRACTS SERVICE, et al.,
Defendants-Appellees.

APPEAL from the United States District Court for the Southern District of Ohio, Western Division.

Decided and Filed June 29, 1978.

Before: PHILLIPS, Chief Judge, EDWARDS and PECK, Circuit Judges.

PER CURIAM. In this case, after the District Court granted motions for summary judgment in favor of all defendants, this court reversed in part and remanded for a District Court hearing on two fact problems. We said:

> The District Court has jurisdiction of this action under 28 U.S.C. § 1331 (1970). *See also Bell* v. *Hood,* 327 U.S. 678 (1946). We believe the complaint states a cause of action under *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388 (1971). We recognize that *Bivens* dealt with a Fourth Amendment violation, but its logic appears to us to be equally applicable to a First Amendment violation. *See generally Moore* v. *Koelzer,* 457 F.2d 892 (3d Cir. 1972); *States Marine Lines, Inc.* v. *Schultz,* 498 F.2d 1146 (4th Cir. 1974).
>
> *Yiamouyiannis* v. *Chemical Abstracts Service,* 521 F. 2d 1392, 1393 (6th Cir. 1975).

As an instruction to the District Court as to which fact issues to try, we said:

> Fundamental to appellant's cause of action, of course, is proof that his discharge was "state action." In this regard appellant contends (and appellee denies) that CAS is federally funded to the extent that his discharge must be regarded as governmental action. Alternatively appellant contends (and appellee denies) that the HEW exerted financial pressure upon CAS to silence or fire appellant. These assertions and denials pose questions of fact upon which findings must be made.
>
> If these questions are answered favorably to appellant, there must also be a finding of fact as to whether appellant was, in practical effect, discharged or whether, as appellee contends, he resigned voluntarily.
>
> *Id.* at 1393.

On remand it appears that the District Judge conducted an evidentiary hearing limited to the state action question. The appeal currently before this court as to the issue of state action relies solely upon the fact that Chemical Abstracts Service has a charter from the federal government. We must therefore assume that no evidence, or insufficient evidence, was presented on the fact questions which we identified in our previous consideration of this case.

The District Judge held that the chartering by Congress of this corporation was insufficient to establish state action, and again dismissed the complaint.

The fact that Congress has seen fit to charter an organization otherwise private in character does not, by the mere fact of chartering, render the action of the officers of that organization "state action." This court previously passed on this question in *Northrip* v. *Federal National Mortgage Assn.,* 527 F.2d 23 (6th Cir. 1975). *See also Stearns* v. *Veterans of Foreign Wars,* 394 F. Supp. 138 (D.D.C. 1975), *aff'd without opinion,* 527 F.2d 1387 (D.C. Cir.), *cert. denied,* 429 U.S. 822 (1976).

We have considered appellant's reliance upon *McCullock* v. *Maryland,* 17 U.S. (4 Wheat.) 316 (1819), but do not find that it is applicable to either the facts or legal argument in our instant case.

The judgment of the District Court is affirmed.

Supreme Court, U. S.
FILED
OCT 25 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-521

DR. JOHN YIAMOUYIANNIS
Petitioner,
v.
CHEMICAL ABSTRACTS SERVICE, et al.
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

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---

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion delivered in the court below is not as yet officially reported but is appended to the Petition for a Writ of Certiorari.

JURISDICTION

Respondents do not question the jurisdiction as set forth in the Petition.

QUESTION PRESENTED

While Respondents disagree with the conclusion of the United States Court of Appeals for the Sixth Circuit that a right of action exists directly under the First Amendment, *Yiamouyiannis* v. *Chemical Abstracts Service*, 521 F.2d 1392 (6th Cir. 1975), the only question of which review can properly be sought through the instant Petition is: whether the fact that Congress has granted a federal charter to an organization, otherwise private in character, renders the actions of the officers of such an organization "state action."

STATEMENT OF THE CASE

Respondents accept Petitioner's statement of the case as substantially correct except the statement that the American Chemical Society is "a corporation *established* by Act of Congress." Respondents disagree in so far as that statement would seem to imply that 50 Stat.L. 798, passed in 1937 by Congress, "established" the American Chemical Society. The American Chemical Society had existed since 1876 as a private "corporation existing under the laws of the State of New York," 50 Stat.L. 798, Chapter 762, prior to receiving a federal charter in 1937.

ARGUMENT

The Respondent, Chemical Abstracts Service, is a division of the American Chemical Society, a private, non-profit corporation the purposes of which are: "to encourage . . . the advancement of chemistry in all its branches; the promotion of

research in chemical science and industry; the improvement of the qualifications and usefulness of chemists . . . ; the increase and diffusion of chemical knowledge; and . . . to promote scientific interests and inquiry . . . ." The American Chemical Society had existed, as a New York corporation, since 1876 prior to receiving its federal charter in 1937.

Petitioner maintains that since the American Chemical Society was chartered by Congress, *ipso facto*, the actions of the Society's corporate officers constitute "governmental" or "state action." This assertion ignores the recognized standards established in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), *Moose Lodge No. 17* v. *Irvis*, 407 U.S. 163 (1972) and *Jackson* v. *Metropolitan Edison Company*, 419 U.S. 345 (1974), for determining the existence *vel non* of sufficient governmental involvement with a private entity so as to convert the private entities actions into "governmental action."

Ignoring the detailed analysis and careful reasoning contained in those cases, Petitioner attempts to reduce their holdings to an overly simplistic test under which a court need only determine whether the entity involved is "public" or private. According to Petitioner, the distinguishing factor in *Burton* and *Moose Lodge* was that in *Moose Lodge* the corporation was private and in *Burton* the corporation was "public." (Petition at 16). Petitioner conveniently overlooks the fact that in *Burton* the questions as to "state action" arose only because it was a private entity, which leased space from a "public" corporation, that was engaging in discriminatory activity.

Having formulated the simplistic test of "public" corporation versus private corporation, Petitioner contends that the American Chemical Society is a "public" corporation solely by virtue of its federal charter. While Petitioner attempts to buttress this argument through reference to *Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819) and *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), those cases and the issues addressed in them provide no guidance in regard to the question of "state action." In *M'Culloch* v. *Maryland, supra*, this

Court held that the states may not tax federal instrumentalities which have been created to carry out governmental functions in furtherance of the federal government's constitutional power to enact such laws as are necessary and proper to enable the government to execute its powers. The American Chemical Society was not federally chartered in order that it might execute governmental functions, nor does it execute any such functions. Further, the American Chemical Society is not immune from taxation. The Society has been granted certain tax exemptions since, as a scientific and educational institution, it qualifies for exemption under 26 USC §501(c)(3), but it remains liable for taxes on its unrelated business income and on such of its properties as are not used in connection with its educational and scientific purposes.

Petitioner's reliance on *Dartmouth College* v. *Woodward, supra,* is similarly misplaced. Despite the language quoted by Petitioner (Petition at 12-13), this Court made it clear that mere incorporation of an entity will not change its character. Just as the American Chemical Society, Dartmouth College had existed prior to its receiving a charter, and, as the Court stated:

> "From the fact, then, that a charter of incorporation has been granted, nothing can be inferred which changes the character of the institution, or transfers to the government any new power over it. . . . [T]he incorporating act [cannot] change the character of a private eleemosynary institution."

17 U.S. at 638-39.

As was pointed out by the United States Court of Appeals for the Sixth Circuit in *Blackburn* v. *Fisk University,* 443 F.2d 121, 123 (6th Cir. 1971): "State involvement sufficient to transform a 'private' university into a 'State' university requires more than merely chartering the university," (citing *Dartmouth College, supra*). See also, *Sament* v. *Hahnemann Medical College & Hospital,* 413 F.Supp 434, 439, (E.D.Pa. 1976), *aff'd.,* 547 F.2d 1164 (3rd Cir. 1977); *Greenya* v. *George Washington University,* 512 F.2d 556, 559 (D.C.Cir. 1975).

In no case has this or any other court held that the mere grant of a federal or state charter to an otherwise private institution converts the actions of that institution's officials into "state action." The Petitioner has failed to cite any such authority. Instead, Petitioner presents this Court with the example of the Veterans of Foreign Wars (VFW), a federally chartered association, and urges that discriminatory action engaged in by the VFW would constitute "state action" due to the VFW's "contacts" with the federal government.

Respondents are somewhat nonplused by this argument inasmuch as the Sixth Circuit specifically referred to *Stearns* v. *Veterans of Foreign Wars,* 394 F.Supp. 138 (D.D.C. 1975), *aff'd,* 527 F.2d 1387 (D.C.Cir.), *cert. denied,* 429 U.S. 822 (1976) in rendering the decision forming the basis for the instant Petition for Certiorari. *Stearns* is on all fours with the instant case and, there, the court flatly rejected the argument that a federal charter automatically converted the actions of an institution into "state action."

Although *Stearns* involved a claim of sex discrimination, rather than a First Amendment claim, the legal issues posed and resolved are identical to those in the instant case. In *Stearns,* the plaintiff asserted that the VFW's membership limitation, restricting its membership to males meeting certain military service requirements, was violative of the equal protection guarantee in the due process clause of the Fifth Amendment. Her initial pleadings contended that, by virtue of the fact that the VFW has a federal charter, there is the kind of significant governmental involvement which constitutes "state action." On cross motions, both of which were considered as motions for summary judgment, the district court granted judgment to the VFW. On appeal, the plaintiff argued, for the first time, that the involvement of the government with VFW went beyond mere chartering.

The United States Court of Appeals for the District of Columbia Circuit, while noting that it tended to agree that federal chartering alone did not give rise to "state action,"

reversed and remanded in order that the plaintiff might produce evidence of further government involvement sufficient to overcome a motion for summary judgment. *Stearns* v. *Veterans of Foreign Wars,* 500 F.2d 788 (D.C.Cir. 1974).

On remand and after discovery, the district court again considered cross motions for summary judgment and, once more, rendered judgment for the defendant, stating:

> "Having sifted the facts and weighed the circumstances herein, the Court finds itself unpersuaded that the government is in any way significantly involved with the exclusionary membership policy of the VFW."

394 F.Supp. at 138. On appeal from the court's second order, the judgment was affirmed without opinion, 527 F.2d 1387 (D.C.Cir.) and certiorari was denied, 429 U.S. 822 (1976).

Contrary to the method advocated by Petitioner (*i.e.,* to inquire only as to whether the entity is "public" or "private"), the court in *Stearns* engaged in the "sifting of acts and weighing circumstances" required by this Court. *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961).

In the case of *Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345 (1974), this Court reaffirmed the principle that the determination of state involvement must be based on a particularized inquiry focusing on whether there is:

> " . . . a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."

419 U.S. at 351. This Court declined to find that such a "close nexus" existed in that case where the facts disclosed that a public utility furnishing electricity had been granted a partial monopoly by the State and that it was subject to a form of extensive governmental regulation by the State in a way most other businesses were not.

In order to establish "state action," not only must it be shown that there is a symbiotic relationship between the defendant and the federal government, but also it must be shown that the government was involved in the allegedly injurious activity. "[T]he essential point [is] that the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury." *Powe* v. *Miles,* 407 F.2d 73, 81 (2d Cir. 1968). Petitioner herein failed to produce sufficient evidence to establish "state action" as to either of these conjunctive standards.

The district court "sifted the facts and weighed circumstances" as to the asserted connections between the American Chemical Society and the federal government and concluded that the federal charter, receipt of public funds, granting of tax exemptions, and the obligation to make annual reports to Congress failed to create the necessary significant involvement between the government and the American Chemical Society. (Appendix to Petition at 25a-27a). This is in accord with the settled decisional authority. See, *e.g., Stearns* v. *Veterans of Foreign Wars, supra; Sanford* v. *Howard University,* 415 F.Supp. 23 (D.D.C. 1976), *aff'd.* 549 F.2d 830 (D.C.Cir. 1977); *Blackburn* v. *Fisk University,* 443 F.2d 121 (6th Cir. 1971); *Brown* v. *Mitchell,* 409 F.2d 593 (10th Cir. 1969) and cases cited therein.

The district court also found that the evidence submitted by the plaintiff failed to show any involvement by the federal government in the alleged actions giving rise to his claim and, therefore, as a matter of law there was no "state action." (Appendix to Petition at 27a).

The district court having so found and concluded, the only issue presented for review to the Court of Appeals was whether a federal charter, standing alone, constitutes sufficient involvement with the federal government to render the actions of the officers of the American Chemical Society "state action." As

has been previously discussed, the Court of Appeals correctly held that a chartering by Congress is insufficient to establish "state action."

CONCLUSION

This Court has recognized the clear distinction between the operation of constitutional guarantees on "private" conduct and "state" action. In *Jackson* v. *Metropolitan Edison Company, supra,* the Court stated:

> "The Due Process Clause of the Fourteenth Amendment provides 'nor shall any State deprive any person of life, liberty, or property, without due process of law.' In 1883, this Court in The Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835, affirmed the essential dichotomy set forth in that Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, 'however discriminatory and wrongful,' against which the Fourteenth Amendment offers no shield. *Shelley* v. *Kraemer,* 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948)."

The American Chemical Society is a private, non-profit, membership corporation, and it is submitted that this corporation cannot be said to have engaged in activities which were the result of "governmental action" or were authorized, fostered or mandated by the federal government. Petitioner's having failed to establish the action of Respondents as "governmental," it is unnecessary to consider the issue as to the availability of relief directly under the First Amendment.

The Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in this case should be denied.

Respectfully submitted,

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